May 7, 2001

Ms. Nina Rose Hatfield
Acting Director
Bureau of Land Management
Administrative Record
Room 401 LS
1849 C Street, NW
Washington, DC 20240
E-mail: WOComment@blm.gov

Re: Proposed Suspension of the Mining Claims Under the General Mining Laws Rule

Dear Ms. Hatfield:

By way of introduction, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is also required by the Regulatory Flexibility Act (RFA) to monitor agency compliance with the RFA. 5 U.S.C. § 612. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id.

On Friday, March 23, 2001, the Bureau of Land Management (BLM) published a proposal to suspend the final regulations to amend the section 3809 rules governing mining operations that were implemented on January 20, 2001. BLM is proposing to suspend the rule because four lawsuits have been filed alleging that the final rule violates: the RFA, the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act, and the General Mining Law. In lieu of the new rules, BLM proposes to reinstate the rules that were in effect on January 19, 2001. For the reasons stated below, the Office of Advocacy supports BLM's decision to suspend the new rules and reinstate the old rules.

Background

In May 1998, the United States District Court for the District of Columbia found that the Bureau of Land Management (BLM) violated the requirements of the RFA by using an alternative size standard without obtaining the approval of SBA and without consulting with the Office of Advocacy prior to promulgating a rule on reclamation bonds for the mining industry. The court remanded the rule to the agency for procedures consistent with its opinion. *See* Northwest Mining v. Babbitt, 5 F. Supp.2d 9 (D.D.C., 1998).

Pursuant to the court order, on February 9, 1999 the Bureau of Land Management (BLM) published a proposed rule in the Federal Register on *Mining Claims Under General Mining Laws; Surface Management*. 64 Fed.Reg. 6422 (1999). The purpose of the proposed rule was to revise BLM's regulations governing mining operations involving metallic and some other minerals on public lands administered by BLM and to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized by mining laws. The Office of Advocacy submitted timely comments on the proposal on May 10, 1999. Those comments are incorporated by reference and are attached to this document as Attachment #1.

Subsequent to the closing of the comment period, Congress ordered BLM to provide at least 120 days for public comment on the National Academy of Sciences (NAS) report on environmental and reclamation requirements relating to mining on public lands that Congress ordered BLM have prepared. 64 Fed.Reg 57613, at 57614. On October 26, 1999, the Bureau of Land Management (BLM) published a supplemental proposed rule and reopened the comment period on the NAS study recommendations for *Mining Claims Under General Mining Laws; Surface Management*. Id. at 57613. At that time, BLM also reopened the comment period on the RFA section of the proposal. Id. at 57618. The Office of Advocacy filed timely comments on the supplemental proposed rule on February 23, 2000. Those comments are incorporated by reference and attached to this document as Attachment #2.

In October 2000, the Bureau of Land Management (BLM) requested the Office of Advocacy's comments on the Draft Final Regulatory Flexibility Analysis (DFRFA). At that time, Advocacy expressed concerns about BLM's failure to allow for notice and comment on the substantial irreparable harm provision, which is also known by the industry as the "mine veto" provision of the rule. Advocacy asserted that failure to provide an economic analysis of the new provision violated the RFA and the APA. Advocacy also questioned BLM's failure to give full consideration to the alternatives in the NRC report and the economic impact of the rule. The October 2000 comments are incorporated by reference and attached to this document as Attachment #3.[1]

The Final Rule Should be Suspended Permanently

The Office of Advocacy asserts that the final rule should be suspended permanently. Although BLM has addressed some of the issues raised in Advocacy's previous comments, Advocacy still has some concerns about whether the final rule complies with the APA, the RFA, and the findings of the NRC report.

[1] Normally, the Office of Advocacy does not release comments submitted on draft documents. However, in this instance, it is Advocacy's understanding that BLM released the document as part of its court pleadings. Accordingly, it is a part of the public record and, therefore, no longer confidential.

The Final Rule Violates the APA

Pursuant to the APA, agencies are required to provide the public with notice and comment of most types of rulemakings. Moreover, under the APA, a final rule must be a lineal descendant of, and in character with the earlier proposed rule; changes must flow logically from the prescribed comment and if the final rule deviates substantially from the proposed rule, it amounts to a new proposal and must run the regulatory gauntlet afresh. O'Connell v. Shalala, 79 F.3d 170 (1st Cir., 1996).

Advocacy asserts that the definition of undue and unneccessary degradation in the final rule deviates substantially from the proposed rule. The final rule added a provision to the definition to include activities that may cause substantial irreparable harm (SIH) to the selected mine site. The provision allows for a BLM official to deny a plan of operations after a company has explored the area and prepared a plan of operations for the a mining operation. If the BLM official believes that it may cause significant irreparable harm to the area, the mine permit will be denied.

The change, by BLM's own admission, is a significant change to the rule. 65 Fed. Reg.69998, at 70106 (2000) At the time of finalization, BLM stated that it could not determine the magnitude of the impact, incidence of costs, the potentially affected entities (and their employment size class), and the timing of the impacts. However, it did acknowledge that the gross direct costs associated with the chosen alternative, which includes the SIH provision, were estimated to be $305 million-$877 million.

Advocacy asserts that it is irresponsible for an agency to implement knowingly an action when it admittedly has limited knowledge about the potential impact, especially when the limited knowledge indicates that the impact could be close to a billion dollars. The consequences of the decision to change the definition are potentially astronomical. Such a change should not have occurred without allowing the public an opportunity to comment on the economic impact of the change. By allowing for notice and comment, BLM would not only have complied with the APA and RFA, it may also have received valuable input from the public to aid in the rulemaking process and possible alternatives to minimize the impacts on small entities.

The Final Rule Usurps the Intent of the RFA

Moreover, in finalizing the rule with the SIH provision, BLM did not perform an RFA analysis on the impact of the the definition change. The basis of the failure was that the impact was difficult to determine. BLM, however, did acknowledge that the change would impact operators who engage in mineral exploration and/or development activities, many of which are small.

The purpose of the RFA is to require agencies "to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." See, 5 U.S.C. §601, Congressional Findings and Declaration of purpose, Sec. 2(b)(1980). Given that the SIH provision of the final rule was a significant change from the proposal, Advocacy asserts that BLM should have prepared an interim regulatory flexibility analysis to provide the public with information about the economic impact before publishing a final rule. More importantly, a supplemental analysis would have allowed BLM to solicit information from the public that may have assisted BLM in ascertaining the magnitude of the impact on small entities. By failing to perform an RFA analysis, Advocacy asserts that BLM violated the intent of the RFA.

The National Research Council Report

The NRC report supports the permanent suspension of the newly finalized 3809 rule. The NRC report studied the regulations that existed prior to January 20, 2001. It concluded that Federal land management agencies already had at their disposal an array of statutes and regulations that generally assured environmentally responsible resource development. These tools, however, were unevenly and sometimes inexpertly applied. The NRC concluded that improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process.

The NRC made several recommendations, some of which were considered as Alternative 5 in the rulemaking process. The gross direct costs of Alternative 5 were estimated to be $22 million to $182 million, substantially less than the $305 million-$877 million gross direct costs associated with the rule that was implemented on January 20, 2001. Advocacy asserts that if the rules that were in place on January 19, 2001 merely needed minor adjustments, the adjustments should have been made. Accordingly, there was no reason to promulgate a final rule that may cost $855 million (the highest possible cost of the chosen alternative minus the lowest possible cost of the NRC recommendation), if the adjustments meet the needs of the agency. In that the NRC is a highly reputable independent organization that prepared the report on the necessity of the rule at the request of Congress, BLM should have given the report full, unbiased consideration. BLM's failure to do so was arbitrary and capricious.

CONCLUSION

Throughout the regulatory process, Advocacy has questioned the necessity of the rule that was implemented on January 20, 2001; the magnitude of the impact of that rule on small entities; and BLM's failure to consider and implement less costly alternatives. The rule that was finalized could have an economic impact $877 million. Considering the fact that there are serious questions about whether the rule was truly necessary and the manner in which certain aspects of the rule were promulgated, Advocacy asserts that it would be unconscionable to let the final rule stand. Advocacy, therefore, supports BLM's decision to suspend the 3809 rule that was implemented on January 20, 2001 and reinstate the regulations that were in effect on January 19, 2001.

Thank you for the opportunity to comment on the draft final rule. If you have any questions, please feel free to contact this office.

Sincerely,

Susan M. Walthall
Acting Chief Counsel of Advocacy

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation

Attachments

May 10, 1999

VIA ELECTRONIC &
REGULAR MAIL

Bureau of Land Management
Administrative Record
Nevada State Office
P.O. Box 12000
Reno, Nevada

Re: Mining Claims Under the General Mining Laws; Surface Management

Dear Sir/Madam:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by §612 of the Regulatory Flexibility Act RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act which made a number of significant changes to the Regulatory Flexibility Act, the most significant being provisions to allow judicial review of agencies' regulatory flexibility analyses.

REGULATORY FLEXIBILITY ACT REQUIREMENTS

The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9. When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a); *Id.*.

Initial Regulatory Flexibility Analysis

If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule. The required IRFA is prepared in order

to ensure that the agency has considered all reasonable regulatory alternatives that would meet the agency’s policy objectives but minimize the rule' s economic impact on affected small entities. In accordance with Section 603(b) of the RFA, each IRFA must address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap or conflict with the proposed rule.

Section 603(c) further provides that:

> "Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."(Emphasis added)

In terms of statutory construction, the word "shall" means shall. The courts have made it clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command. United States v. Monsanto, 491 U.S. 600, 607, 105 L. Ed. 2d 512, 109 S. Ct. 2657 (1989); Pierce v. Underwood, 487 U.S. 552, 569-70, 101 L.Ed. 2d 490, 108 S. Ct. 2541 (1988); Barrentine v. Arkansas-Best Freight Sys., Inc. 450 U.S. 728, 739 n.15, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981); Forest Guardians v. Babbitt, No. 97-2370, 1998 U.S. App. LEXIS 37992, (10th Cir. 1998). Accordingly, the term "shall" in the RFA reflects Congress's intent to impose a mandatory duty on the agencies to consider and describe significant alternatives that will accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.

Certification

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency shall publish such a certification in the Federal Register at the time of the publication of the general notice of proposed rulemaking along with a statement providing the factual basis for the certification. (Emphasis added)

BACKGROUND

In 1991, the Bureau of Land Management (BLM) published a proposal to revise regulations implementing Section 302(b) of the Federal Land Policy and Management Act of 1976 ("FLPMA"). FLPMA directs the Secretary of Interior to prevent nnecessary or undue degradation of public lands from activities conducted pursuant to the Mining Law of 1872.

BLM' s original regulations, implementing section 302(b) of FLPMA, went into effect on January 1, 1981. The rule, 43 C.F.R. § 3809.1-3, required mining claimants to complete reclamation during and upon termination of exploration and mining activities under the mining laws on federal lands administered by BLM. The rule classified mining operations in terms of casual use, notice operations, or plan of operations. The bonding requirements for plans of operation were at BLM's discretion. 43 C.F.R. § 3809.0-5 Bonds were not required for casual use or notice operations unless there was a pattern of violation.

The rule that BLM proposed in 1991 explained that bonding or other financial or surety arrangements would be useful to protect against unnecessary and undue degradation of land. The proposal required submission of financial guarantees for reclamation for all operations greater than casual use; created additional financial instruments to satisfy the requirement for a financial guarantee; and amended the noncompliance section of the regulations to require the filing of plans of operations by operators who establish a record of noncompliance. It also required "notice operators" to certify the existence of a financial guarantee in the amount of $5,000. Operators proceeding under a "plan of operations" were required to provide a financial guarantee sufficient to cover the performance of the reclamation. The financial guarantee was capped at $1,000 per acre for exploration activities and $2,000 for mining activities.

In terms of the RFA, the BLM did not perform an initial regulatory flexibility analysis of the proposed rulemaking. Instead, the agency stated, without any explanation, that "under the Regulatory Flexibility Act (5 USC § 601 et seq.) that the proposed rule will not have a significant economic impact on a substantial number of small entities." The "certification" was devoid of an explanation for the basis of the certification as required by 5 U.S.C. § 605(b) of the RFA in 1991 (at that time, pre-SBREFA, a "succinct" statement was required).

Six years elapsed before BLM published the final rule in the Federal Register on February 28, 1997. In the final rule, BLM changed the bonding requirement for "notice operations". Instead of requiring notice operations to provide a financial guarantee in the amount of $5,000 (essentially, a ceiling) as proposed in 1991, BLM unilaterally decided, under the final rule, to require notice level operators to provide a bond sufficient to cover 100 percent of the estimated costs of reclamation with a minimum rate of $1,000 per acre (essentially, a floor). In addition, BLM amended the rule to include another significant requirement not discussed in the proposed rule that only professional engineers provide the certification of operators' calculation of the cost of reclamation.

In terms of the RFA, BLM certified that the final rule would not have a significant economic impact on a substantial number of small entities. The statement and supporting "analysis" were based on a definition of "small miner" that differed from the definition in SBA's regulations. BLM did not consult with the Office of Advocacy or SBA, prior to selecting an alternative size standard, as required by the RFA.

Shortly after the rule was finalized, the mining industry challenged BLM's actions. In May 1998, the United States District Court for the District of Columbia found that BLM had violated the requirements of the RFA by using an alternative size standard without consulting with SBA and the Office of Advocacy. The court remanded the rule to the agency for procedures consistent with the opinion. *See* Northwest Mining v. Babbitt, 5 F. Supp.2d 9, (D.D.C., 1998).

BLM'S CURRENT PROPOSAL

On February 9, 1999, BLM published a proposed rule in the *Federal Register*, Vol. 64, No. 26, p. 6422 on Mining Claims Under the General Mining Laws; Surface Management. This proposal was in response to the court's directive to perform procedures consistent with the court's opinion. While the Office of Advocacy acknowledges that BLM has made some improvements in its quest to comply with the RFA, Advocacy is disturbed by BLM's failure to abide by many of the major components of RFA compliance.

Size Standards

As stated previously, the court remanded this matter to the agency because BLM did not consult with the Office of Advocacy or SBA prior to using an alternate size standard. That particular aspect of compliance is no longer an issue. The Office of Advocacy is pleased by the fact that BLM consulted with Advocacy and SBA about the size standard issue prior to reproposing the rule. Indeed, the agency performed two analyses, one with the SBA size standard and another using a subcategory, to determine the economic impact of the proposal on the industry. The Office of Advocacy, therefore, is not concerned about whether BLM has complied with the size standard requirements. The number of deficiencies in the economic analysis, however, disturbs the Office of Advocacy.

BLM's RFA Classification

In the proposed rule, the Bureau of Land Management (BLM) concludes that:

> "While the proposed rule affects a significant number of small entities, the impacts cannot be classified as significant. Therefore, BLM has determined under the RFA that this proposed rule would not have a significant economic impact on a substantial number of small entities. For additional information, see the Regulatory Flexibility Analysis on file in the BLM Administrative Record…"

Id., at 6449. The Office of Advocacy read the RFA statement and the RFA analysis that was provided by BLM. After reading the RFA statement and reviewing the "economic analysis", Advocacy is unable to ascertain whether BLM is certifying the rulemaking or submitting an Initial Regulatory Flexibility Analysis (IRFA). In any event, the Office of Advocacy disagrees with BLM's determination of no significant economic impact on a substantial number of small entities. Advocacy further asserts that given the magnitude of the impact, certification is improper and the information provided is insufficient for meeting the requirements of an IRFA.

BLM's Criteria for Determining Significant Economic Impact Indicates that the Agency Should Have Performed An IRFA

As quoted in the preceding, BLM concluded that the proposal will affect a substantial number of small entities. The only issue, then, is the magnitude of that anticipated effect on this substantial number.

Although BLM concludes that the proposed rule will not have a "significant economic impact", this conclusion is not supported by the data in BLM's economic analysis. BLM states its criteria for determining "significant economic impact" on page 79 of the "IRFA". It states that:

> "The definition of "significant economic impact' used in this analysis is an impact that causes a 3% or more impact on estimated annual operating costs or on the ratio of the net present value of compliance costs to gross sales."

Using BLM's criteria, it is fairly clear from its own analysis that the proposal will have a significant economic impact on a substantial number of small entities.

BLM makes several different statements, throughout the proposal, about the economic impacts that would support a finding of "significant economic impact." BLM discusses the impact on placer, open pit, strip mine, and exploration models. The various representations about impact include statements that:

> "…the impact on a small placer firm would be at the low end of 'average' range, the 'average' impact represents about <u>9% of the estimated net present value of gross revenues</u>." "IRFA" at p. 95.
>
> "… for the modeled strip operation, the net present value of costs is <u>about 4% of the estimated net present value of gross revenues.</u> "IRFA" at p. 96.
>
> "…considered on a present value basis, the estimated percent cost increases were 2.9%, <u>5.6%, 7.9%, and 38% respectively for the placer, the open pit, the strip mine, and the exploration models</u>." "IRFA" at p. 100.
>
> "… the estimated percent cost increases were 2.0%, <u>8.9%, and 6.7% for the modeled placer, open pit, and strip mining operations, respectively</u>." <u>Id.</u>
>
> "...increasing the proportion of waste rock backfilled...from 25% to 50% increased the present value of costs [for the open pit model] from <u>5.6% to 15.6%</u>..." <u>Id.</u>
>
> "… increases in bonding costs required by the proposed rule will cause costs to increase by 4.9%, 11.9%, and 13.8% for placer, open pit, and strip respectively." <u>Id.</u>
>
> "Exploration activities were estimated to face <u>annual cost increases ranging from 0-38%.</u>" " IRFA" at p.101.
>
> "If it were assumed that the distribution of potential exploration cost increases was 0%, 20%, 30%, and 40%, and that the distribution of potentially impacted firms was 5%, 20%, 50%, 20%, and 5%, this implies that <u>the average cost increase is on the order of 11%</u>..." "IRFA" at pp.101-102.
>
> "The <u>estimated average annual percentage cost changes</u> associated with the modeled open pit and strip operations <u>were 7-9%</u>..." "IRFA" at p.103.
>
> "On a net present value basis, the <u>estimated percent cost increases were 2.9%, 5.6%, and 7.8%</u>, respectively, for the placer model, the open pit model, and the strip model." <u>Id.</u>
>
> "On an average annual basis, the <u>estimated percent cost increases were 2.0%, 8.9%, and 6.7%</u> for the modeled placer, open pit, and strip operations." <u>Id.</u>

Needless to say, the 9%, 4%, 4.9% 5.6%, 7.9%, 11.9%, 13.8% and 38% all exceed the BLM threshold of 3%. Individually and in the aggregate, the impacts on the various segments of the industry indicate a significant economic impact. BLM's finding, therefore, of "no significant economic impact" is beyond comprehension.

In addition, the Office of Advocacy's Office of Economic Research also reviewed the economic data provided BLM. After analyzing the data provided, it concluded that the proposal will have a significant economic impact on a substantial number of small entities. Specifically, David W. Schnare, Ph.D found that:

> "…Contrary to the BLM conclusion, the rule does impose significant costs and does so on the vast majority of small entities. Analysis of IRS data demonstrates that the regulated industries operate at the edge of profitability and that the rule would oust small business from this industry.

Background

BLM has certified that the proposed rule "would not have a significant economic impact on a substantial number of small entities." *See* 64 FR 261, 6421 (Feb. 9, 1999); http://www-a.blm.gov/nhp/news/regul/3800/43_3809t.html> at page 69 of 124. Under the Regulatory Flexibility Act (RFA) (5 U.S.C. §605(b)), BLM is required to provide "the factual basis for such certification." The proposed rule would regulate only those mineral mining operations on federal lands and would not cover oil, gas or coal mining. The major feature of the proposal would require regulated establishments to provide a financial guarantee (*e.g.* surety bond) sufficient to fully pay for restoration of federal lands upon completion of mining. In the main, the regulated industry is the metal and industrial minerals mining industry (NAICS 2122, 2123; SIC 10 & 14). When drawing on Department of the Treasury, IRS data, the regulated industries fall into Major Groups 02 & 05, consisting of minor industry groups 1070, 1098 and 1430,1498, respectively.

Significance of Economic Impacts
Selection of Evaluation Criteria

BLM states that if more than 20% of affected entities suffer an increase of 3% or more in operating costs (or more than 3% of gross sales), it would find the proposed rule to impose a significant impact on a substantial number of small entities. BLM, Initial Small Business and Regulatory Flexibility Act Analysis at 79 (1998). The agency offers no economic or financial basis for either the cost or the revenue-based criterion, nor can they without related them to the profitability of the industry. Rather, the BLM suggests that it applies these criteria because two other agencies use similar criteria. In fact, NOAA has withdrawn its cost-based criterion because it had no cogent rationale on which to ground the measure. As well, EPA has retreated from a revenue-based approach whenever possible, looking instead to profit-based measures. In the absence of an independent basis for selecting its criteria, BLM has no rational basis for its measure.

The Rule Imposes a Significant Impact on a Substantial Number of Small Entities, even when Applying the BLM Criterion

In its economic analysis, BLM states that placer, open pit and strip mines will suffer average regulatory cost increases of 2.9%, 9% and 8%, respectively. *See, id.* at 46. Under normal distributions, these average cost increases would affect well in excess of 20% of the regulated population. BLM estimates the dollar amounts of these average annual impacts at between

$56,667 and $85,000. These cost increases clearly exceed the "3% cost increase for 20% of small entities" criterion it selected for use.

The Proposed Rule would Erase Profitability for Most Small Hard Rock Miners

The $56,667 (minimum) average annual regulatory cost to small mining entities constitutes a massive assault on profitability within the industry. As Table 1 indicates, the vast majority of miners operate at the very edge of profitability. At best, small entities report small profits. The vast majority report losses. Even taking the whole industry, $56,667 constitutes 31% of profit in the best year for the most profitable part of the industry.

Table 1

	1991	1992	1993
Metal Mining			
Percent of Returns from Small Entities (Small = <$5M Assets)	89%	92%	>54%
Percent Reporting a Loss	88%	91%	88%
Percent of Small Entities Reporting a Loss (Small = < $5M Assets)	89%	93%	92%
Average Profits ($1,000s)	$183	$129	$162
Average Profit or Loss of Small Entities ($1,000s) (Small = <$5M Assets)	$23	-$1	-$52

Also drawn from IRS data, additional tables (attached), provide information by eight size categories and for four subcategories within the regulated universe. These tables exceeds the average profit even amongst those who report profits, with the exception of medium-sized and large gold miners.(1)

Conclusion

The Proposed DOI Rulemaking Subpart 3809 "Surface Management Rule" imposes a significant impact on a substantial number of small entities. The regulatory costs would impose impacts so large as to suggest BLM plans to remove small hard rock miners from the market place, as only very large operations could shoulder the costs and remain profitable." (2)

In that the economic information indicates a significant economic impact on a substantial number of small entities, certification of the proposal is improper. Accordingly, BLM must perform an IRFA in order to comply with the requirements of the RFA.

BLM's Economic Analysis Does Not Comply with the Requirements of an IRFA

Even as an IRFA, the economic analysis provided by BLM does not comply with the requirements of the RFA. The RFA requires an agency to provide forthright information about the potential economic impact of a proposed rulemaking and to consider alternatives to that rulemaking.

From an economic standpoint, Dr. Schnare found that the proposed rule would erase profitability for most of the small hard rock miners. BLM, however, steadfastly maintains that the impact will not be significant, even though their own data indicates otherwise. BLM's failure to admit to the potential impact of the proposal compromises the integrity of its analysis. If an agency refuses to recognize the adverse impacts of its actions, the agency cannot inform the public about the potential adverse effects of the proposal as required by the RFA.

In addition to failing to provide an economic analysis that meets the criteria for an adequate IRFA, BLM also failed to consider and make available for public comment realistic alternatives to the action.

BLM Has Failed to Analyze the Alternatives As Required By the RFA

As stated previously, the Congressional intent is clear- agencies **must** consider alternatives to regulatory proposals, in addition to the economic data, when preparing an IRFA. The absence of alternatives renders an IRFA inadequate.

BLM does not provide viable alternatives in its analysis. In fact, BLM's analysis contains no viable alternatives to the action. Instead, BLM provides "options" for mitigating the effects on small businesses. These "options" include choices such as 1) shifting their operations to non-federal lands; 2) adopting different techniques; 3) shortening the life of the mine; or 4) temporarily halting mining until commodity prices increase. ("IRFA" p. 104 of analysis)

Aside from the fact that BLM did not consider the economic impact of the options, these "options" are not alternatives to the agency action. These are mere suggestions as to what BLM thinks that a member of the industry should do if the new requirements are too burdensome, not alternative regulatory actions to BLM's proposal.

Moreover, with the exception of adopting different changing techniques, the "options" provided are not really realistic options for a small business to undertake in order to mitigate economic impact. As for adopting different techniques, BLM neither provides nor analyzes suggested changes. The other "options" are tantamount to saying "if you don't want to abide by the new bonding requirement, then get off the federal land or go out of business."

Aside from such "options" being incredibly callous and insensitive suggestions, they in no way indicate an understanding that the purpose of the RFA is to enhance agency sensitivity to the economic impact of rulemaking on small businesses and to ensure that alternative proposals receive serious consideration at the agency level. If anything, they indicate insensitivity to the economic impact on small businesses and a cavalier attitude towards the requirement that agencies consider alternatives.

In the remand submission for Southern Offshore Fisheries v. Daley(3), the National Marine Fisheries Services (NMFS) considered alternatives such as "closure of the LCS fishery" and "maintaining the status quo. In reviewing NMFS's submission the United States District Court for the Middle District of Florida stated that NMFS had afforded minimal treatment to more realistic and constructive alternatives.(4) The court found the agency's "seemingly cosmetic and cursory consideration of alternatives" to be "disconcerting".(5) The court ruled that NMFS inadequately considered, and perhaps overlooked altogether, feasible alternatives or adjustments to the 1997 quotas that may mitigate the quotas' pecuniary injury to the directed shark fishermen and appointed a special master(6) to review the matter for workable alternatives. (7)

The Office of Advocacy asserts that BLM's failure to consider alternatives is far more egregious than the failures of NMFS. At least NMFS provided a superficial consideration of alternative agency actions. BLM's consideration of alternatives for the agency to consider is totally nonexistent. If NMFS's superficial treatment of alternatives did not withstand judicial scrutiny, BLM's nonexistent treatment of alternatives surely will not.

CONCLUSION

The "economic analysis" provided by BLM does not satisfy the court's remand order in Northwest Mining v. Babbitt. While the court's directive to perform procedures consistent with the court's opinion is admittedly vague, BLM's proposed analysis would only comply with the court's directive through an extremely narrow interpretation of the court's order. The narrow interpretation would be that the court merely meant for BLM to consult with the Office of Advocacy about the proper size standard prior to performing an economic analysis and issuing a proposed rule. In essence, for BLM to believe that its economic analysis complies with the court's order, BLM must believe that the court only intended for BLM to comply with the size standard portion of the RFA before proposing the remanded rule. Such an interpretation is not only irrational, it is also illogical and nonsensical.

A rational and good faith interpretation of the court's ruling would be that the court remanded the matter to the agency for BLM to submit an analysis that complied with the requirements of the RFA. The RFA compels an agency to make a reasonable and good faith effort, prior to the issuance of a final rule, to inform the public about potential adverse effects of his proposals and about less harmful alternatives. Associated Fisheries of Maine v. Daley, 127 F.3d 104,114-115 (1st Cir., 1997); Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411, 1436 (M.D. Fl., 1998). BLM has not met that burden. Because the deficiencies in the analysis are so extreme, the Office of Advocacy submits that BLM must republish the rule with an IRFA that complies with the requirements of the RFA. Failure to do so not only disregards the requirements of RFA and court's order, it also disregards the tenets of fair and rational rulemaking.

If you have any questions, please feel to contact Jennifer A. Smith, Assistant Chief Counsel for Economic Regulation at 202-205-6943. Thank you for allowing me to comment on this important proposal.

Sincerely,

Jere W. Glover
Chief Counsel
Office of Advocacy

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation &
International Trade

ATTACHMENT #1

May 10, 1999

Re: DOI Subpart 3809 – Surface Mining Certification

The Office of Interagency Affairs has asked for a technical review of the "Initial Small Business and Regulatory Flexibility Act Analysis" for the Department of Interior (DOI) (Bureau of Land Management (BLM)) Proposed Subpart 3809 Surface Management rule(8), and in particular for a review on the conclusion that the proposed rule would not impost a significant economic impact on a substantial number of small entities. Contrary to the BLM conclusion, the rule does impose significant costs and does so on the vast majority of small entities. Analysis of IRS data demonstrates that the regulated industries operate at the edge of profitability and that the rule would oust small business from this industry.

Background

BLM has certified that the proposed rule "would not have a significant economic impact on a substantial number of small entities." *See* 64 FR 261, 6421 (Feb. 9, 1999); http://www-a.blm.gov/nhp/news/regul/3800/43_3809t.html> at page 69 of 124. Under the Regulatory Flexibility Act (RFA) (5 U.S.C. §605(b)), BLM is required to provide "the factual basis for such certification." The proposed rule would regulate only those mineral mining operations on federal lands and would not cover oil, gas or coal mining. The major feature of the proposal would require regulated establishments to provide a financial guarantee (*e.g.* surety bond) sufficient to fully pay for restoration of federal lands upon completion of mining. In the main, the regulated industry is the metal and industrial minerals mining industry (NAICS 2122, 2123; SIC 10 & 14). When drawing on Department of the Treasury, IRS data, the regulated industries fall into Major Groups 02 & 05, consisting of minor industry groups 1070, 1098 and 1430, 1498, respectively.

Significance of Economic Impacts
Selection of Evaluation Criteria

BLM states that if more than 20% of affected entities suffer an increase of 3% or more in operating costs (or more than 3% of gross sales), it would find the proposed rule to impose a significant impact on a substantial number of small entities. BLM, Initial Small Business and Regulatory Flexibility Act Analysis at 79 (1998). The agency offers no economic or financial basis for either the cost or the revenue-based criterion, nor can they without related them to the profitability of the industry. Rather, the BLM suggests that it applies these criteria because two other agencies use similar criteria. In fact, NOAA has withdrawn its cost-based criterion because it had no cogent rationale on which to ground the measure. As well, EPA has retreated from a revenue-based approach whenever possible, looking instead to profit-based measures. In the absence of an independent basis for selecting its criteria, BLM has no rational basis for its measure.

The Rule Imposes a Significant Impact on a Substantial Number of Small Entities, even when Applying the BLM Criterion

In its economic analysis, BLM states that placer, open pit and strip mines will suffer average regulatory cost increases of 2.9%, 9% and 8%, respectively. *See, id.* at 46. Under normal distributions, these average cost increases would affect well in excess of 20% of the regulated population. BLM estimates the dollar amounts of these average annual impacts at between $56,667 and $85,000. These cost increases clearly exceed the "3% cost increase for 20% of small entities" criterion it selected for use.

The Proposed Rule would Erase Profitability for Most Small Hard Rock Miners

The $56,667 (minimum) average annual regulatory cost to small mining entities constitutes a massive assault on profitability within the industry. As Table 1 indicates, the vast majority of miners operate at the very edge of profitability. At best, small entities report small profits. The vast majority report losses. Even taking the whole industry, $56,667 constitutes 31% of profit in the best year for the most profitable part of the industry.

Table 1

	1991	1992	1993
Metal Mining			
Percent of Returns from Small Entities (Small = <$5M Assets)	89%	92%	>54%
Percent Reporting a Loss	88%	91%	88%
Percent of Small Entities Reporting a Loss (Small = <$5M Assets)	89%	93%	92%
Average Profits ($1,000s)	$183	$129	$162
Average Profit or Loss of Small Entities ($1,000s) (Small = <$5M Assets)	-$23	-$1	-$52

Table 1, Cont.

Non-Metallic Minerals	1991	1992	1993
Percent of Returns from Small Entities (Small = <$5M Assets)	94%	92%	84%
Percent Reporting a Loss	71%	58%	60%
Percent of Small Entities Reporting a Loss (Small = < $5M Assets)	74%	61%	67%
Average Profits ($1,000s)	$71	$118	$44
Average Profit or Loss of Small Entities ($1,000s) (Small = <$5M Assets)	$16	$12	$2

Source: IRS, Statistics of Income, Publication 1053 (1991-1993).

Also drawn from IRS data, additional tables (attached), provide information by eight size categories and for four subcategories within the regulated universe. These tables show that a $56,667 annual cost exceeds the average profit even amongst those who report profits, with the exception of medium-sized and large gold miners(9)

Conclusion

The Proposed DOI Rulemaking Subpart 3809 "Surface Management Rule" imposes a significant impact on a substantial number of small entities. The regulatory costs would impose impacts so large as to suggest BLM plans to remove small hard rock miners from the market place, as only very large operations could shoulder the costs and remain profitable.

____

David W. Schnare, Ph.D.

				July 1991 - June 1992					
Industry				**Asset Class ($1,000)**					
	Total	$1- 99	$100- 249	$250- 499	$500- 999	$1,000- 4,999	$5,000- 9,999	$10,000- 24,999	$25,00 and ove
Metal Mining									
Number of Returns	1,365	322	408	183	186	116	31	30	[illegible]

Percent Reporting Net Income (profit)	12%	0%	0%	50%	0%	41%	13%	33%	***
Average Net Income **All Returns** ($1,000s)	$183	-$3	-$42	$3	-$92	$58	-$1,841	-$656	$5,33
Average Net Income **Profitable Returns** ($1,000s)	$4,608	None	None	$6	None	$891	$137	$317	***
0 **Copper, Lead, Zinc, Gold and Silver Ores**									
Number of Returns	836	322	***	183	131	69	22	16	[illegible]
Percent Reporting Net Income (profit)	18%	None	None	50%	None	42%	18%	63%	***
Average Net Income **All Returns** ($1,000s)	$44	-$3	***	$3	-$138	$302	-$2,445	-$685	$2,5
Average Net Income **Profitable Returns** ($1,000s)	$3,539	None	None	$6	None	$1,411	$137	$317	***
8 **Other Metal Mining**									
Number of Returns	530	None	***	None	54	47	9	15	[illegible]
Percent Reporting Net Income (profit)	5%	None	None	None	None	40%	None	None	***
Average Net Income **All Returns** ($1,000s)	$401	None	***	None	-$0.3	-$301	-$366	-$579	$13,3
Average Net Income **Profitable Returns** ($1,000s)	$10,414	None	None	None	None	$97	None	None	***

Non-metallic Minerals Except Fuels									

Number of Returns	4612	2157	475	660	443	589	116	95	(
Percent Reporting Net Income (profit)	29%	None	21%	62%	47%	71%	68%	63%	74
Average Net Income **All Returns** ($1,000s)	$71	-$2	$17	$14	-$21	$110	$168	$388	$2,8(
Average Net Income **Profitable Returns** ($1,000s)	$428	None	$109	$36	$24	$286	$450	$1,358	$5,7
0 **Dimension, Crushed, and Broken Stone; Sand and Gravel**									
Number of Returns	4019	***	441	578	395	549	94	70	
Percent Reporting Net Income (profit)	30%	None	19%	71%	41%	73%	76%	70%	***
Average Net Income **All Returns** ($1,000s)	$62	***	-$5	$24	-$28	$151	$265	$372	$1,1
Average Net Income **Profitable Returns** ($1,000s)	$354	None	$8	$36	$19	$282	$497	$1,075	***
8 **Other Non-Metallic Minerals**									
Number of Returns	593	***	34	82	47	40	23	25	
Percent Reporting Net Income (profit)	20%	None	59%	None	100%	35%	35%	48%	***
Average Net Income **All Returns** ($1,000s)	$133	***	$297	-$52	$41	-$460	-$237	$431	$4,7
Average Net Income **Profitable Returns** ($1,000s)	$1,200	None	$527	None	$41	$422	$38	$2,404	***

Industry				**July 1992 - June 1993**				

				Asset Class ($1,000)					
	Total	$1- 99	$100- 249	$250- 499	$500- 999	$1,000- 4,999	$5,000- 9,999	$10,000- 24,999	$25,00 and ove
Metal Mining									
Number of Returns	2088	1133	198	320	173	91	44	30	[illegible]
Percent Reporting Net Income (profit)	9%	None	None	None	43%	57%	7%	60%	45
Average Net Income **All Returns** ($1,000s)	$129	-$12	-$12	-$29	$97	$68	-$512	-$267	$5,186
Average Net Income **Profitable Returns** ($1,000s)	$4,515	-	-	-	$232	$359	$150	$1,737	$28,1
0 **Copper, Lead, Zinc, Gold and Silver Ores**									
Number of Returns	1274	696	None	320	70	71	24	18	[illegible]
Percent Reporting Net Income (profit)	7%	None	-	None	***	44%	None	56%	42
Average Net Income **All Returns** ($1,000s)	$152	-$20	-	-$29	$157	$82	-$607	-$171	$5,000
Average Net Income **Profitable Returns** ($1,000s)	$7,815	-	-	-	***	$589	-	$2,721	$33,6
8 **Other Metal Mining**									
Number of Returns	814	437	198	None	103	21	19	12	[illegible]
Percent Reporting Net Income (profit)	12%	None	None	None	***	100%	16%	67%	53
Average Net Income **All Returns** ($1,000s)	$92	-$1	-$12	-	$57	$19	-$419	-$412	$5,743

Average Net Income **Profitable Returns** ($1,000s)	$1,438	-	-	-	***	$19	$150	$506	$15,0
Non-metallic Minerals Except Fuels									
Number of Returns	4068	1435	763	605	380	558	152	87	(
Percent Reporting Net Income (profit)	42%	None	74%	54%	46%	70%	72%	55%	62
Average Net Income **All Returns** ($1,000s)	$118	-$10	$27	$9	-$11	$41	$531	$230	$4,6
Average Net Income **Profitable Returns** ($1,000s)	$404	-	$37	$19	$56	$228	$785	$1,154	$5,5
0 **Dimension, Crushed, and Broken Stone; Sand and Gravel**									
Number of Returns	3941	1435	763	605	380	497	135	65	
Percent Reporting Net Income (profit)	42%	None	74%	54%	46%	76%	74%	65%	***
Average Net Income **All Returns** ($1,000s)	$88	-$10	$27	$9	-$11	$178	$1,281	$368	$3,939
Average Net Income **Profitable Returns** ($1,000s)	$314	-	$37	$19	$56	$217	$785	$1,035	***
8 **Other Non-Metallic Minerals**									
Number of Returns	127	None	None	None	None	61	17	22	
Percent Reporting Net Income (profit)	52%	-	-	-	-	59%	None	27%	84
Average Net Income **All Returns** ($1,000s)	$1,059	-	-	-	-	-$16	-$151	-$178	$6,525

Average Net Income **Profitable Returns** ($1,000s)	$2,652	-	-	-	-	$339	-	$1,984	$8,3

Industry				**July 1993 - June 1994**					
				Asset Class ($1,000)					
	Total	$1- 99	$100- 249	$250- 499	$500- 999	$1,000- 4,999	$5,000- 9,999	$10,000- 24,999	$25,000 and ove
Metal Mining									
Number of Returns	1546	***	368	200	156	108	37	35	[illegible]
Percent Reporting Net Income (profit)	12%	None	None	None	63%	26%	None	51%	***
Average Net Income **All Returns** ($1,000s)	$162	***	-$5	-$54	-$42	-$503	-$1,051	-$438	$6,521
Average Net Income **Profitable Returns** ($1,000s)	$4,664	-	-	-	$55	$616	-	$2,282	***
0 **Copper, Lead, Zinc, Gold and Silver Ores**									
Number of Returns	905	344	187	133	58	66	15	24	[illegible]
Percent Reporting Net Income (profit)	6%	None	None	None	None	5%	None	42%	43
Average Net Income **All Returns** ($1,000s)	$231	-$52	-$1	-$4	-$207	-$720	-$1,671	-$154	$6,629
Average Net Income **Profitable Returns** ($1,000s)	$13,170	-	-	-	-	$3,236	-	$950	$37,6
8 **Other Metal Mining**									

Number of Returns	641	***	181	67	98	42	22	11	
Percent Reporting Net Income (profit)	21%	None	None	None	100%	57%	None	64%	***
Average Net Income **All Returns** ($1,000s)	$64	***	-$9	-$154	$55	-$162	-$627	-$1,057	$6,129
Average Net Income **Profitable Returns** ($1,000s)	$1,011	-	-	-	$55	$314	-	$4,512	***
Non-metallic Minerals Except Fuels									
Number of Returns	4175	1474	412	629	455	519	143	77	
Percent Reporting Net Income (profit)	40%	13%	100%	38%	24%	63%	73%	65%	***
Average Net Income **All Returns** ($1,000s)	$44	$3	$30	-$37	-$32	$36	$480	$10	$1,9
Average Net Income **Profitable Returns** ($1,000s)	$331	$23	$30	$30	$83	$179	$820	$917	***
0 **Dimension, Crushed, and Broken Stone; Sand and Gravel**									
Number of Returns	3864	1474	412	629	455	466	132	61	
Percent Reporting Net Income (profit)	42%	13%	100%	38%	24%	67%	70%	72%	***
Average Net Income **All Returns** ($1,000s)	$52	$3	$30	-$37	-$32	$43	$503	$203	$2,728
Average Net Income **Profitable Returns** ($1,000s)	$248	$23	$30	$30	$83	$144	$893	$942	***

8 **Other Non-Metallic Minerals**									
Number of Returns	311	None	None	None	None	53	10	16	[illegible]
Percent Reporting Net Income (profit)	15%	-	-	-	-	30%	100%	38%	94
Average Net Income **All Returns** ($1,000s)	-$58	-	-	-	-	-$27	$229	-$725	-$84
Average Net Income **Profitable Returns** ($1,000s)	$3,208	-	-	-	-	$848	$229	$731	$8,7

ENDNOTES

1. Notably, gold mines reflect economic outliers from the rest of the mining community. An examination of data for the rest of the regulated industry suggests that BLM’s reliance on gold mines as the basis for economic modeling may significantly mask the economic consequences of its actions. Although the proposed rules would have very large impacts on small gold mines, the economics of these mines, and the large environmental consequences of these mine, as compared to others, suggests BLM should have considered different restrictions for gold mines than for other mines.

2. See Attachment 1.

3. Southern Offshore Fishing Association v. Daley, Case No. 97-1134-CIV-T, United States District Court, Middle District of Florida, Tampa Division, October 16, 1998. (Attached as Attachment #2).

4. Slip Op. at 5.

5. Slip Op. at 6.

6. The court also ordered NMFS to absorb the costs incurred in the employment of the special master at an hourly rate of $275. Slip Op. at 8.

7. Slip Op. at 7.

8. BLM includes all regulatory impact analysis in a document entitled "Benefit-Cost Analysis/Unfunded Mandates Reform Act Analysis and Initial Small Business and Regulatory Flexibility Act Analysis" (December 22, 1998).

9. Notably, gold mines reflect economic outliers from the rest of the mining community. An examination of data for the rest of the regulated industry suggests that BLM’s reliance on gold mines as the basis for economic modeling may significantly mask the economic consequences of its actions. Although the proposed rules would have very large impacts on small gold mines, the economics of these mines, and the large environmental consequences of these mine, as compared to others, suggests BLM should have considered different restrictions for gold mines than for

other mines.

February 23, 2000

VIA ELECTRONIC &
REGULAR MAIL

Mr. Tom Fry
Acting Director
Bureau of Land Management
Department of Interior
1849 C Street, NW
Room 5660
Washington, DC 20240
Facsimile (202) 208-5242

Re: Mining Claims Under General Mining Laws; Surface Management

Dear Mr. Fry:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by the Regulatory Flexibility Act (RFA) to monitor agency compliance with the RFA. 5 U.S.C.§ 612. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id.

Background

In May 1998, the United States District Court for the District of Columbia found that the Bureau of Land Management (BLM) violated the requirements of the RFA by using an alternative size standard without consulting with SBA and the Office of Advocacy prior to promulgating a rule on reclamation bonds for the mining industry. The court remanded the rule to the agency for procedures consistent with its opinion. *See* Northwest Mining v. Babbitt, 5 F. Supp.2d 9 (D.D.C., 1998).

Pursuant to the court order, on February 9, 1999 the Bureau of Land Management (BLM) published a proposed rule in the Federal Register on *Mining Claims Under General Mining Laws; Surface Management*. Federal Register, Vol. 64, No. 26, p. 6422. The purpose of the proposed rule was to revise BLM's regulations governing mining operations involving metallic and some other minerals on public lands administered by BLM. BLM stated that the purpose of the proposed regulations was to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized by mining laws. The Office of Advocacy submitted timely comments on the proposal on May 10, 1999. Advocacy incorporates those comments by reference.

Subsequent to the closing of the comment period, Congress ordered BLM to provide at least 120 days for public comment on the National Academy of Sciences (NAS) report on environmental and reclamation requirements relating to mining on public lands that Congress ordered BLM have prepared. 64 FR 57613, at 57614. On October 26, 1999, the Bureau of Land Management (BLM) published a supplemental proposed rule and reopened the comment period on the NAS study recommendations for *Mining Claims Under General Mining Laws; Surface Management*. Id. at 57613. At that time, BLM also reopened the comment period on the RFA section of the proposal. Id., at 57618. This comment will focus specifically on BLM's treatment of the RFA in the supplemental proposed rulemaking.

National Academy of Science Study

In the study, the NAS draws several conclusions about the environmental and reclamation requirements relating to mining on public lands. It also makes several recommendations to address the concerns raised in the study. The conclusions and recommendations are provided below.

NAS's Conclusions

NAS concluded that existing regulations are generally well coordinated, although some changes are necessary. The overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated, but generally effective. It stated that conclusions that address overall environmental efficiency and program efficiency include:

(1) Federal land management agencies regulatory standards for mining should continue to focus on the clear statement of management goals rather than defining inflexible, technically prescriptive standards. Simple "one-size-fits-all" solutions are impractical because mining confronts too great an assortment of site-specific technical, environmental, and social conditions. Each proposed mining operation should be examined on its own merits.

(2) If backfilling of mines is to be considered, it should be determined on a case-by-case basis, as was concluded by the Committee on Surface Mining and Reclamation (COSMAR) report (NRC, 1979). Site-specific conditions are too variable for prescriptive regulation.

(3) The Bureau of Land Management (BLM) and the Forest Service need not have identical regulations, but some changes are warranted. The two agencies have broadly similar land management mandates. There are, however, some differences in the kinds of lands they manage, in their specific responsibilities, and in their organization. Whereas some of the Committee's recommendations would make

the agencies' approaches to regulating hardrock mining more similar, the Committee is not suggesting that uniformity in all aspects is necessary.

(4) Some small mining and milling operations present environmental risks and potential financial liabilities for the public. These exposures are small by comparison to large operations, but as currently regulated they constitute a disproportionate share of the problems for the land management agencies.

(5) Current regulations do not provide land management agencies with straightforward procedures for modification of plans of operations even with compelling environmental justification.

(6) Federal criteria do not distinguish between temporarily idle mines and abandoned operations. This distinction is important because mines that become temporarily idle in response to cyclical metal prices and other factors need to be stabilized but not reclaimed, whereas mines that are permanently idle need to be reclaimed.

(7) Financial risks to the public and environmental risks to the land exist whenever secure financial assurances are lacking.

(8) Current regulations discourage reclamation of abandoned mine sites by new mine operators. New mineral deposits are commonly found at the sites of earlier mines. Even though the operator of a new mine may volunteer to clean up previous degradation, the long-term liability acquired under current regulations can be significant. As a result, non-taxpayer supported reclamation opportunities are missed and undisturbed lands may be preferentially disturbed for new mining sites.

(9) Post-mining land use and environmental protection are inadequately addressed by both agencies and applicants. The regulations and plans of operation generally specify what actions will be taken to protect water quality and what surface reclamation is to be performed for closure. However, there is inadequate consideration of protection of the reclaimed land from future adverse uses; of very long-term or perpetual site maintenance; or of rare, but inevitable, natural emergencies. [1]

The NAS further concludes that improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process. Federal land management agencies already have at their disposal an array of statutes and regulations that for the most part assure environmentally responsible resource development, but these tools are unevenly and sometimes inexpertly applied. Specifically, it found that:

(1) The National Environmental Policy Act (NEPA) process is the key to establishing an effective balance between mineral development and environmental protection.

[1] National Research Council, Hardrock Mining on Federal Lands, pp.89-91.

The effectiveness of NEPA depends on full participation of all stakeholders throughout the NEPA process. Unfortunately this rarely happens in a timely fashion.

(2) The Committee was consistently frustrated by the lack of reliable information on mining on federal lands. The lack of thorough information extends from that needed to characterize the lands available for mineral development to that needed to track mining and compliance with regulations. Without more and better information, it is difficult to manage federal lands properly and assure the public that its interests are protected.

(3) Deficiencies in both staff size and training were observed by the Committee in some offices of land management agencies. Increases in staffing and improved training should result in improved environmental protection and program efficiency.

(4) Forest Service permitting procedures for mineral exploration projects with limited environmental impact commonly take significantly longer than is necessary.

(5) Misunderstandings of the term "unnecessary or undue degradation" (FLPMA, 1976 [43 U.S.C. §7401 et seq.]) leave some BLM field staff uncertain whether the agency has the authority to protect valuable resources, such as riparian habitats, that may not be specifically protected by other laws.

(6) Federal land management agency representatives are inconsistent in their understanding of their enforcement authority and tools. This results from uncertain interpretations of the statutes and regulations, inadequate staff training, and deficiencies in the tools themselves.

(7) Inefficiencies and time delays in the completion of environmental review under NEPA, issuance of permits, and conduct of other administrative actions unnecessarily consume the resources and time of many stakeholders.

(8) Better information on federal lands is needed to make wise land use decisions. The land use planning process required for BLM and Forest Service lands by the Federal Lands Policy and Management Act and the National Forest Management Act, respectively, provide for identification of land and resources deserving special environmental concern.[2]

Moreover, NAS concluded that successful environmental protection is based on sound science. Improvements are needed in the development of more accurate predictive models and tools and of more reliable prevention, protection, reclamation, and monitoring strategies at mine sites. The science base is far from complete and environmental protection requires that improvements continue to be devised. Some of the most important environmental concerns at hardrock mining sites are those related to long-

---

[2] Id., at pp. 91-92.

term water quality and water quantity, which affect riparian, aquatic biological, groundwater, and surface water resources. A broadly coordinated, national research effort is needed to guide future development and to create improved methods for predicting, measuring, and mitigating environmental impacts related to hardrock mining.[3]

NAS further concluded that portions of the public and the mining industry have little confidence in the propriety or fairness of the regulatory and permitting system. Some members of the public perceive that regulators work too closely with the companies and permit operations without sufficient environmental safeguards. Conversely, some mining operators experience delays that they perceive to be caused, in part, by members of the public who seek to forestall mining through the permitting and regulatory processes. Lack of confidence in the regulatory and permitting system can lead to delays and higher costs for industry, regulatory agencies, and the public and can also limit opportunities for improving environmental protection.[4]

Finally, NAS found that conditions are changing for regulations and mining. Technology, social values, the economy, and scientific understanding change continually. Thus, environmental regulations applicable to mining will be most effective if they can use these changes to improve environmental protection. Similarly, the mining industry should benefit through lower operating cost and greater environmental protection. Therefore, a regulatory system that is adaptive to change will serve the public, the environment, and industry best.[5]

NAS Recommendations

NAS made several recommendations to address the issues raised by the study. Those recommendations included:

(1) Financial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use, even if the area disturbed is less than 5 acres.

(2) Plans of operations should be required for mining and milling operations, other than those classified as casual use or exploration activities, even if the area disturbed is less than 5 acres.

(3) Forest Service regulations should allow exploration disturbing less than 5 acres to be approved or denied expeditiously, similar to notice-level exploration activities on BLM lands.

(4) BLM and the Forest Service should revise their regulations to provide more effective criteria for modifications to plans of operations, where necessary, to protect the federal lands.

---

[3] Id.,at p. 92.
[4] Id.
[5] Id., at p. 93.

(5) BLM and the Forest Service should adopt consistent regulations that a) define the conditions under which mines will be considered to be temporarily closed; b) require that interim management plans be submitted for such periods; and c) define the conditions under which temporary closure becomes permanent and all reclamation and closure requirements must be completed.

(6) Federal land managers in BLM and the Forest Service should have both (1) authority to issue administrative penalties for violations of their regulatory requirements, subject to appropriate due process, and (2) clear procedures for referring activities to other federal and state agencies for enforcement.

(7) Existing environmental laws and regulations should be modified to allow and promote the cleanup of abandoned mine sites in or adjacent to new mine areas without causing mine operators to incur additional environmental liabilities.

(8) Congress should fund an aggressive and coordinated research program related to environmental impacts of hardrock mining.

(9) BLM and the Forest Service should continue to base their permitting decisions on the site-specific evaluation process provided by NEPA. The two land management agencies should continue to use comprehensive performance-based standards rather than using rigid, technically prescriptive standards. The agencies should regularly update technical and policy guidance documents to clarify how statutes and regulations should be interpreted and enforced.

(10) From the earliest stages of the NEPA process, all agencies with jurisdiction over mining operations or affected resources should be required to cooperate effectively in the scoping, preparation, and review of environmental impact assessments for new mines. Tribes and nongovernmental organizations should be encouraged to participate and should participate from the earliest stages.

(11) BLM and the Forest Service should maintain a management information system that effectively tracks compliance with operating plans and environmental permits, and communicates this information to agency managers, the interested public, and other stakeholders.

(12) BLM and the Forest Service should carefully review the adequacy of the staff and other resources devoted to regulating mining operations on federal lands and, to the extent required, expand and/or reallocate existing staff, provide training to improve staff capabilities, secure supplemental technical support from inside and outside the agencies, and provide other support as necessary.

(13) BLM and the Forest Service should identify, regularly update, and make available to the public, information identifying those parts of federal lands that will require

special consideration in land use decisions because of natural and cultural resources or special environmental sensitivities.

(14) BLM and the Forest Service should plan for and assure the long-term post-closure management of mine sites on federal lands.

(15) BLM should prepare guidance manuals and conduct staff training to communicate the agency's authority to protect valuable resources that may not be protected by other laws.

(16) BLM and the Forest Service should plan for and implement a more timely permitting process, while still protecting the environment. [6]

Although BLM states that it is considering comments on all of the recommendations in the NAS study, BLM specifically states and requests comments on recommendations 1, 2, 4,5,6, and 14.[7]

The Supplemental Proposed Rulemaking Does Not Comply with the Court Order, the RFA, or Tenets of Appropriate Rulemaking

Advocacy stated in its comments on May 10th, the economic analysis provided by BLM in the February 1999 proposal did not comply with the requirements of the RFA or the court order. As we stated, the court ordered BLM to prepare an economic analysis that utilized the proper size standards and complied with the RFA. Although BLM consulted with Advocacy on size standards, it did not provided a coherent and meaningful analysis of the proposal and alternatives as required by the RFA.

Nothing in the supplemental proposed rulemaking changes or mitigates the inadequacies of the February 1999 proposal. If anything, the lack of clarity and information in the supplemental proposal exacerbates further the problems with BLM's treatment of the RFA and its procedure in this rulemaking.

In reviewing the "supplemental proposal" it is unclear whether BLM is soliciting comments for an advanced notice of proposed rulemaking or truly attempting to supplement its earlier February 1999 proposal. If it is soliciting information for an advance notice of proposed rulemaking to determine whether it will implement the NAS recommendations, Advocacy commends BLM on its decision to solicit comments to obtain information that incorporates the recommendations and also complies with the analytical process mandated by the RFA about the impact of the recommendations *prior to publishing the proposed rule*.

If, however, this is an effort at *finalizing* the original proposal, Advocacy is truly perplexed by BLM's procedure. Is BLM stating that it is planning to implement the NAS recommendations instead of the February 1999 proposal? If so, shouldn't BLM

---

[6] Id. at pp. 93-123.
[7] 64 FR57615-57617.

state clearly that this is the intent, withdraw the February 1999 proposal, provide specifics as to the means that it plans to use to implement the NAS recommendations, and provide an economic analysis of the supplemental recommendations as required by the RFA? Advocacy asserts that if this "supplemental rulemaking" is an effort to proceed directly to a final rule, even though the material modifies the proposal, then BLM would be in violation of both the RFA and the APA.

The Supplemental Rule Does Not Comply with the Requirements of the RFA

The Office of Advocacy asserts that the February 1999 economic analysis and the reopening of the February 1999 comment period is insufficient for the supplemental proposed rulemaking. BLM has not "identified which of NAS's recommendations it is considering nor provided any sort of analysis of the economic impact of the recommendations on small entities. BLM merely states that it prepared an IRFA and certified the proposed rulemaking in February 1999.[8] It states that it is reopening the comment period for the February 1999 proposal for 120 days. [9].

BLM's decision not to provide the information required by the RFA on the supplemental proposal is problematic. NAS provides recommendations that are alternatives to BLM's proposal that were not a part of the February 1999 economic analysis. For example, although BLM and NAS agree that financial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use, even if the area disturbed is less than 5 acres, the two organizations provide different solutions to the problem.[10] The 3809 proposed rule, which is the subject of the February 1999 economic analysis, provides an analysis of BLM's solution to the problem-minimum standard bond amounts determined by acreage. NAS recommends that BLM establish bond amounts by activity. In doing so, NAS surmises that bond amounts by activity recognizes that certain activities are less costly, as well as expedites the permit process and negates the need for detailed calculations based on an engineers report. Moreover, NAS encourages the use of bond pools to lessen the impact on small entities.[11]

What is it-with specificity-that BLM is considering? How can the public provide meaningful information?

[8] As the Office of Advocacy states in its May 10, 1999 letter on the proposed rulemaking in this matter, the economic document that BLM prepared did not meet the requirements of an IRFA or support BLM's finding of " no significant economic impact" as required for a proper certification. Advocacy reiterates its position on that issue.
[9] Id., at 57618.
[10] Id., at 57615.
[11] NAS study at p.95.

A FRFA Will Not Cure BLM's Noncompliance with the RFA

BLM states that if comments indicate that there will be a significant economic impact, it will prepare a FRFA to address the RFA issues. A FRFA on what?- is the question that BM has to answer. The RFA compels an agency to make a reasonable and good faith effort, prior to the issuance of a final rule, to inform the public about potential adverse effects of his proposals and about less harmful alternatives. Associated Fisheries of Maine v. Daley, 127 F.3d 104,114-115 (1st Cir., 1997); Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411, 1436 (M.D. Fl., 1998). Moreover, in Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411 (M.D. Fl. 1998), the court held that preparation of a FRFA, when an initial analysis had not been prepared, violated the RFA and APA because the public had not had an opportunity to review and provide comments on the information in the IRFA or the agency's alternatives.

In this instance, BLM is not telling the public what it is considering. If it is proceeding to finalize the original rule, it must first do an adequate IRFA, including an analysis of alternatives such as those recommended by NAS.

Conclusion

Before proceeding to a final rule, BLM must publish for public comment a new proposed rule if it is considering any of the NAS' recommendations. If BLM is considering finalizing the proposed rule, then it must comply with the Court's order and also publish an adequate IRFA that addresses the inadequacies in the economic analysis in the proposal, including alternatives. Failure to do so denies the public of its right to be fully informed during the comment period; frustrates BLM's attempt to obtain meaningful comments; and runs the risk that small businesses and BLM will have to spend valuable time and resources litigating this particular matter in the judicial system.

If you have any questions, please feel free to contact me at (202) 205-6533.

Sincerely,

Jere W. Glover
Chief Counsel
Office of Advocacy

Sincerely,

Jennifer Alisa Smith
Assistant Chief Counsel
for Economic Regulation &
International Trade

OCTOBER 13, 2000

TO: MICHAEL SCHWARTZ
BUREAU OF LAND MANAGEMENT
DEPARTMENT OF INTERIOR

FR: JENNIFER SMITH
ASSISTANT CHIEF COUNSEL
FOR ECONOMIC REGULATION
& INTERNATIONAL TRADE
OFFICE OF ADVOCACY

ALLEN BASALA
SENIOR REGULATORY AND NATIONAL POLICY ADVISOR
OFFICE OF ADVOCACY

RE: FINAL REGULATORY FLEXIBILITY ANALYSIS FOR THE DEPARTMENT OF INTERIOR'S RULEMAKING ON SUBPART 3809-SURFACE MANAGEMENT

The Office Management and Budget requested the Office of Advocacy's opinion on the review the draft final regulatory flexibility analysis (FRFA) for the Bureau of Land Management's (BLM) final rulemaking on Subpart 3809-Surface Management. The documents submitted are lengthy and it is apparent that BLM has put forth a significant effort. However, after reviewing the materials, the Office of Advocacy has concluded that the documents submitted do not comply with the requirements of the RFA for the reasons stated below.[1]

Requirements of a FRFA

Section 604 of the RFA sets forth the requirements of a FRFA. It states:

§ 604. Final regulatory flexibility analysis

> (a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain--

[1] Please note that this document is intended to be a confidential interagency communication to provide BLM and OMB with information about whether the draft documents for the rule comply with the requirements of the Regulatory Flexibility Act (RFA) and to provide the agency with guidance on complying with the RFA. It is the practice of the Office of Advocacy not to release such documents without prior approval from the particular agency in question.

(1) a succinct statement of the need for, and objectives of, the rule;
(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.
(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register such analysis or a summary thereof.

Draft Preamble

Preliminarily, the Office of Advocacy notes that BLM has failed to comply with the publication requirement found in Section 604(b) of the RFA. Section 604(b) requires BLM to make copies of the final regulatory flexibility analysis available to members of the public and publish in the Federal Register such analysis or a summary thereof. BLM has done neither.

Instead of providing information on how the public can obtain a copy of the FRFA, BLM states in the preamble that the public should "see the final RFA analysis on file in the BLM Administrative Record at the Nevada State Office, P.O. Box 12000, Reno, Nevada 89520". (Draft Preamble, page 234). Advocacy believes that the statement may have been an error and that BLM meant to state that the public may obtain a copy of the FRFA by contacting the Nevada State Office at the address provided in the preamble.

If the statement was not an error, Advocacy submits that BLM has not met its obligations under the RFA to make copies available to the public. As a practical matter, it is not convenient for the majority of the public to go to Reno, Nevada to review a FRFA. Moreover, the address given for the Nevada State Office is a post office box and not an actually street address; therefore, making a visit to the office an impossibility. In any event, even if a street address were provided, it would not meet the requirement that the agency make copies available to the public.

Summary of the FRFA

Advocacy realizes that given the length of the FRFA, it may not be economically feasible for BLM to publish the entire FRFA in the *Federal Register*. As noted above, 604(b) allows for a summary to be provided in lieu of publishing the FRFA in such instances. The summary should be the "Cliff Note" version of the FRFA in that it should allow the public to ascertain the substance of the FRFA since the FRFA is not being published. It should provide information about the purpose of the rule, need for the rule, description of the industry, affected members of the industry, impact of the rule, compliance requirements, alternatives, and all of the other elements of the FRFA. Although the FRFA for the 3809 rule addresses the different elements and has a significant amount of information, none of the information is reflected in the preamble.

In the draft preamble, BLM does not provide an adequate summary of the FRFA. Instead of summarizing the information in the FRFA, the summary sets forth conclusory statements without providing the basis for the conclusions. It states:

> "We have concluded that this final rule will have a significant impact on a substantial number of small entities. The magnitude of the impact will vary considerably depending on the nature and location of the activities, site-specific factors, the particular financial and managerial characteristics of the operations, the presence (and content) of any agreements between BLM and a State, and when the operation would be subject–if at all--to the new regulations. Given these uncertainties, it is not possible to estimate specifically which entities would be affected, the magnitude of the impacts, or the average impacts on the potentially affected entities. The modeling undertaken suggests that the largest cost impacts would be felt by exploration activities; however, all of the other modeled mines have the potential to experience significant profit reductions.

These statements do not address the elements found in the requirements of a FRFA.. To state that "it is not possible to estimate specifically which entities would be affected, the magnitude of the impacts, or the average impacts on the potentially affected entities description of the industry and the possible scope of its impacts" is inaccurate and misleading to the public. Although the FRFA has a significant amount of information on the description of the industry, the estimated number of small entities affected and the estimated magnitude of the impacts, this information is not provided in the summary. (See pages 106-114, 115-117, and 117-142, respectively). Moreover, there is no insight into the alternatives considered or rationale for selecting a particular alternative.

Finally, the summary provided in the preamble in no way reflects the significant amount of effort and work that BLM put into preparing the FRFA. If anything, the statement in the preamble gives the appearance that BLM made little to no effort to perform an analysis. This is unfortunate. Even if the public disagrees with the substance of the FRFA, it would be unfair for it to conclude or assume that BLM did not put forth the effort to obtain the information. However, from the summary provided, that assumption/conclusion could be easily reached.

The FRFA Does Not Comply with All of the Requirements of the RFA

Although it is obvious that BLM has put forth a significant amount of effort in preparing the FRFA, it does not comply with the all of the requirements of the RFA. BLM's has provided an explanation of the need for the rule, description of the industry, and summary of issues raised in response to the IRFA.[2] Other aspects of the FRFA, however, are problematic.

Cost Assessment

The economic analysis provided is complex and may be difficult for the average reader to understand. While this may be due partly to the subject matter, Advocacy asserts that it is due primarily to lack of supporting documentation and the omission of certain categories of cost from the analysis. The lack of documentation and information makes it difficult, if not impossible, for the reader to determine the derivation of the numbers and whether or not those numbers are representative of costs faced by the industry in general and small entities in particular. For example, in the section on Placer Models, the report clearly states that "these costs were modeled as an increase in reclamation costs of $10 to $17 per stream foot.."[3] However, no further documentation is presented. By providing additional documentation for the exploration, placer, open pit, strip/industrial, and underground models, the reader may be in a better position to understand the cost estimates.

Moreover, sometimes the cost numbers are explained in more detail. However, the costs are presented in terms of the general industry and there is nothing specific to small entities. For example, in the open pit model the report states: "It was assumed 80% of the plans would obtain bonds at a 5% 'premium' and 20% would obtain bonds at a 10% 'premium'. The weighted average is 6%"[4] The 6% rate in all the scenarios for the open pit model. However, what is important is not the weighted average cost for the industry in general; but how these costs are distributed across small and large entities. That information is not provided.

Furthermore, in the open pit model incremental costs are estimated to range from $10,000 to $50,000 on the low end and from $10,000 to $50,000 on the high end.[5] However, documentation necessary to derive these numbers and their applicability to small entities is not provided.

---

[2] Although Advocacy acknowledges that the comments were addressed, it does not necessarily mean that Advocacy agrees with the response provided by BLM. For example, on page 100, BLM states that the IRFA had contained a discussion of the alternatives and that alternatives are discussed in Section III of the final FRFA. Although Advocacy disagrees with BLM's assessment of the issue, BLM did address the issue.

[3] FRFA, page 127-128.
[4] *Ibid*. page 48.
[5] *Ibid*. page 49.

Also, because the cost outlays occur unevenly through the analytical time horizon, the BLM used annualization techniques to "smooth out" these outlays. The BLM provides a key piece of information, the 7% interest rate, regarding the annualization procedure; but does not provide other information that should be readily available. This concern is applicable to the annualized cost estimates appearing in tables 14,15, and 16 as well as those found in Appendixes A and B of the Cost Benefit Analysis.

Specifically, in order to reproduce or verify the BLM's annualized cost estimates, the reader needs to know what assumptions were made regarding the project time horizon, the occurrence of these outlays over that period, and the economic life of the capital expenditure items. Without that information, the reader cannot reproduce the BLM's annualized cost figures. These are just examples, the lack of supporting documentation is found throughout the model mine cost analysis. By providing the supporting documentation, BLM can help the reader understand the strength and reliability of the subject analysis and its findings.

Advocacy further asserts that the estimated costs provided in the FRFA are understated because they do not take the learning curve and transaction costs into account. For example, in the case of the hardrock mining rule, the regulated entity needs to read and understand the requirements of the draft regulation and supporting documentation. Furthermore, once the regulation is understood, the affected entities will have to acquire the goods and services that satisfies full compliance requirements. As the BLM's present analysis shows, these full compliance costs are substantial and the liabilities significant. Hence, the regulated entities have an incentive to make sure the compliance solutions accomplish their intended objective and do so in a least cost manner.

Furthermore, the search and evaluation efforts to find the appropriate resources to comply with the rule take time and money. For example, the regulated entities will have to search for and evaluate the bonding sources prior to securing a bond. The regulated entities will also have to search for and evaluate the track record and skill mix of consulting and engineering firms. Given the limited resources of small entities, consulting and engineering firms may have to be used to help the small entity comply with the permitting and reclamation requirements of the rule. To a small entity, time is a valuable resource in that the time taken to fulfill the compliance requirements is time taken away from operating a successful venture. The search and evaluation and other transactions costs should be reflected in the present assessment to provide an accurate portrayal of the impact of this rule.

BLM Does Not Provide an Explanation of Alternatives

Section 604 (a)(5) of the RFA requires the agency to consider alternatives to the chosen action, provide information as to why the particular alternative was selected, and an explanation as to why the other significant alternatives which affect the impact on small entities was rejected. BLM has not assessed the alternatives as required.

On page 100, BLM asserts that the discussion of alternatives is found in Section III of the FRFA. Advocacy reviewed Section III, the "Needs and Objectives of the Rule". The only discussion of alternatives that Advocacy could find was in the final paragraph of the section. The paragraph consists of statements about various alternatives but no insight into the impact of the various alternatives on small entities. The statements provide no information regarding BLM's thought process in dismissing an action and, in fact, appear arbitrary. For example, BLM states that the state management option is insufficient to address the problems identified in the rule but there is no explanation as to why it is insufficient. Moreover, it appears as though BLM has not given full consideration to the alternatives that were suggested by the National Research Council to mitigate the impacts on small entities.

Advocacy notes that there is a more detailed discussion on alternatives in the Cost Benefit Analysis and acknowledges that the RFA does not require duplicative work. However, there is no reference in the paragraph on alternatives to refer the reader to the appropriate pages in the Cost Benefit Analysis for a discussion of alternatives. Even if there were such a statement, the discussion of alternatives in the Cost Benefit Analysis does not assess the impact on small entities. It basically addresses environmental concerns, not economic issues. The discussion of alternatives for RFA purposes should at the very least contain number of small entities affected; the costs of the alternative for those small entities; the economic impact of the alternative on small entities, and an explanation as to why the alternative was rejected.

Compliance Guide

BLM states that it will publish a small entity compliance guide and make the guide readily available for small entities. However, the effective dates of the various rule components do not reflect the lead time required to develop an effective guide and distribute and discuss it with the small entities. Without reflecting BLM's commitment of time and resources, the value of the small business compliance guide in terms of mitigating significant impacts on substantial numbers of small entities is unknown.

Other Concerns

Definition of Significant Impact

For a definition of significant impact, BLM refers to a letter written by Advocacy on another matter and states that it is defining significant impact to be 10% reduction in profits. This statement is taken out of context and misconstrued The point being made in that letter was that since BLM had not provided a definition of significant, Advocacy had to assign one in order to determine the impact of the rule. Advocacy selected 10% of reduction in profits because it was seeking a percentage that would be considered significant under any terms. Advocacy could very easily have selected 1% or 3% but it was seeking a percentage that was not debatable, in terms of significance, for that particular argument. In short, it was presented for the sake of argument, not as a universal or absolute truth.

Mine Veto Provision

Advocacy has received letters from the industry concerning a so called “Mine Veto” provision. The industry asserts that the “substantial irreparable harm” addition to the definition of “Unnecessary and Undue Degradation” is going to be extremely harmful to the industry. Advocacy did not speak to the industry about the issue because the draft final rule is confidential and discussing the issue with the industry may lead them to assume that the provision is in the final rule. Advocacy, therefore, is not fully versed in the industry’s concerns. However, Advocacy is concerned that this change, which the industry deems to be significant, was made without an opportunity for notice and comment or an RFA analysis. Advocacy asserts that the failure to provide an economic analysis of the change violates the RFA. Moreover, although BLM states BLM must document in writing that all of the elements have been met, Advocacy cannot find the basis of the statement in the rule.

Thank you for the opportunity to comment on the draft final rule. If you have any questions, please feel free to contact Jennifer Smith at 205-6943 or Allen Basala at 205-6071.